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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

CELESTE WESTBY, individually; THOR WESTBY, individually; TALON WESTBY, a minor by and through his Guardian *Ad Litem* CELESTE WESTBY,

Plaintiffs,

v.

LINCOLN PROPERTY COMPANY, a corporation dba LINCOLN MILITARY HOUSING; JARSCO UTILITIES, INC., a corporation; BI-STATE PROPANE, a corporation; GENERAL ELECTRIC COMPANY, a corporation; ABC FIRE EXTINGUISHER COMPANY, INC., a corporation; CAMP PENDLETON & QUANTICO HOUSING, LLC, a corporation; and DOES 3 through 50, inclusive,

Defendants.

Case No. 5:14-cv-01800-BLF

ORDER DENYING MOTION TO DISMISS FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, FOR CHANGE OF VENUE

[Re: ECF 20]

Plaintiffs Thor Westby, Celeste Westby, and Talon Westby filed this action following an explosion at their home caused by a build-up of propane gas. Plaintiffs sue six companies alleged to have performed negligent construction, manufacture, repair, and/or maintenance that contributed to the explosion. Four of the six defendants move to dismiss the action under Federal Rule of Civil Procedure 12(b)(3) for improper venue or, in the alternative, for change of venue pursuant to 28 U.S.C. § 1404(a). The Court has considered the briefing submitted by the parties.¹ For the reasons discussed below, the motion is DENIED.

¹ The Court vacated the hearing pursuant to Civil Local Rule 7-1(b) after concluding that the motion is appropriate for disposition without oral argument. (ECF 29)

1 **I. BACKGROUND**

2 At the time of the explosion, Thor, Celeste, and Talon Westby resided in a duplex home
3 located in the Department of the Navy’s Coleville Military Family Housing Complex in Coleville,
4 California. (Compl. ¶ 1, ECF 1-1) Plaintiffs allege that at approximately 9:00 p.m. on the night of
5 February 3, 2012, a large build-up of propane gas in their residence ignited upon meeting an
6 “ignition source.” (*Id.*) The resulting explosion destroyed Plaintiffs’ half of the duplex, killed the
7 occupant of the other half of the duplex, and damaged approximately thirty surrounding homes. (*Id.*
8 ¶¶ 1, 21) Emergency responders found thirty-six year old Thor Westby in the living room after the
9 explosion; he suffered “severe physical and emotional injuries” resulting from the explosion and
10 subsequent fire. (*Id.* ¶ 23) Thirty-nine year old Celeste Westby was found in the utility room; she
11 suffered “serious and life threatening injuries, including but not limited to extensive and permanent
12 burn and inhalation injuries with physical scarring and disfigurement.” (*Id.* ¶ 22) Talon Westby,
13 age ten, was visiting a neighbor at the time of the explosion, but he arrived at the scene in time to
14 witness rescue efforts; he is suffering “serious and ongoing psychological and emotional distress.”
15 (*Id.* ¶ 24)

16 Plaintiffs filed this action in the Santa Cruz County Superior Court on January 30, 2014,
17 asserting eleven state law claims: (1) premises liability; (2) negligence; (3) *res ipsa loquitur*; (4)
18 product liability - negligence; (5) product liability - strict liability; (6) breach of express warranty;
19 (7) breach of implied warranty - particular purpose; (8) breach of implied warranty -
20 merchantability; (9) private nuisance; (10) trespass; and (11) loss of consortium. (Compl., ECF 1-1)

21 The complaint alleges liability on the part of four named defendants and Does 1-50.
22 According to Plaintiffs, Defendant Lincoln Property Company, which operated the housing
23 complex, “failed to properly inspect, maintain and safeguard the property from foreseeable
24 dangers.” (Compl. ¶¶ 1, 3(A)) Defendant Bi-State Propane “possessed, sold and distributed the
25 propane gas, and filled and inspected the propane tanks that supplied the propane gas that fueled the
26 explosion.” (*Id.* ¶ 3(B)) Defendant Jarsco Utilities, Inc. “negligently designed, installed, financed,
27 repaired, upgraded, maintained, and/or inspected the propane distribution system so as to create a
28 dangerous condition.” (*Id.* ¶ 3(C)) Finally, General Electric Company “negligently designed,

1 manufactured, tested, installed, repaired, maintained, inspected, and/or introduced into the stream of
2 commerce the gas-powered stove so as to create a dangerous condition.” (*Id.* ¶ 3(D)) While the
3 action was pending in the Superior Court, ABC Fire Extinguisher Company, Inc. and Camp
4 Pendleton & Quantico Housing, LLC, were substituted for Doe 1 and Doe 2, respectively.
5 (Jabagchourian Decl. ¶ 3, ECF 25-1)²

6 On April 18, 2014, Defendant Camp Pendleton & Quantico Housing, LLC removed the
7 action to the United States District Court for the Northern District of California based upon federal
8 enclave jurisdiction. (Not. of Removal, ECF 1) Lincoln Property Company joined in the removal.
9 (*Id.* ¶ 2) The removal was not contested by Plaintiffs. Shortly thereafter, Camp Pendleton &
10 Quantico Housing, LLC and Lincoln Property Company (collectively, “Moving Parties”) filed the
11 present Motion to Dismiss or, in the Alternative, for Change of Venue. (Mot., ECF 20) Moving
12 Parties contend that venue is proper in the Eastern District of California, where the Coleville
13 Military Family Housing Complex is located. A statement of non-opposition to the motion was
14 filed by General Electric Company and joinders in the motion were filed by Amerigas Propane, L.P.
15 (the successor-in-interest to Bi-State Propane) and ABC Fire Extinguisher Company, Inc.³
16 (Statement of Non-Opp., ECF 21; Joinder, ECF 23; Joinder, ECF 24) Plaintiffs’ opposition to the
17 motion was filed on May 28, 2014, and a reply was filed on June 4, 2014.

18 **II. LEGAL STANDARDS**

19 **A. Rule 12(b)(3)**

20 A defense of improper venue may be raised by motion under Federal Rule of Civil
21 Procedure 12(b)(3). When a district court evaluates a Rule 12(b)(3) motion, “pleadings need not be
22 accepted as true, and facts outside the pleadings may be considered.” *Doe 1 v. AOL LLC*, 552 F.3d
23 1077, 1081 (9th Cir. 2009). If a district court determines that venue is improper, the court may
24 dismiss the action or, in the interests of justice, transfer the case to any district in which it could

25 _____
26 ² The Jabagchourian Declaration states that Camp Pendleton & Quantico Housing, LLC was
27 substituted for Doe 2. The Court infers that ABC Fire Extinguisher Company, Inc. was substituted
for Doe 1 based upon ABC’s appearance as a defendant in the case and the fact that the parties’
documents now reflect that the suit is asserted against the named defendants and Does 3 through 50.

28 ³ The joinders are appropriate, as Moving Parties’ arguments apply equally to Amerigas Propane,
L.P. and ABC Fire Extinguisher Company, Inc.

1 have been brought. 28 U.S.C. § 1406(a).

2 **B. Section 1404(a)**

3 “For the convenience of parties and witnesses, in the interest of justice, a district court may
4 transfer any civil action to any other district or division where it might have been brought or to any
5 district or division to which all parties have consented.” 28 U.S.C. § 1404(a).

6 **III. DISCUSSION**

7 **A. Dismissal for Improper Venue**

8 Moving Parties seek dismissal of the action for improper venue pursuant to Federal Rule of
9 Civil Procedure 12(b)(3). As an initial matter, the motion is untimely. A motion asserting any of
10 the defenses listed in Rule 12(b) “must be made before pleading if a responsive pleading is
11 allowed.” Fed. R. Civ. P. 12(b). Moving Parties filed answers before filing the Rule 12(b)(3)
12 motion. (*See* ECF 11, 13) Moreover, those answers did not raise the defense of improper venue.
13 (*See id.*) Failure to raise a defense listed in Rule 12(b)(2)-(5) by either motion or answer constitutes
14 a waiver of the defense. Fed. R. Civ. P. 12(h)(1)(B). The Rule 12(b)(3) motion is subject to denial
15 on these bases.

16 Even if it were to reach the merits, the Court would deny the motion to dismiss. Moving
17 Parties assert that dismissal is warranted because the action is not properly venued in the Northern
18 District of California under 28 U.S.C. § 1391. Section 1391 limits the districts in which a civil
19 action may be “brought.” 28 U.S.C. § 1391.⁴ The present action was not “brought” in the Northern
20

21 ⁴ Section 1391 provides in relevant part that:

22 (b) Venue in general. – A civil action may be brought in –

23 (1) a judicial district in which any defendant resides, if all defendants are residents of
the State in which the district is located;

24 (2) a judicial district in which a substantial part of the events or omissions giving rise
25 to the claim occurred, or a substantial part of property that is the subject of the action
is situated; or

26 (3) if there is no district in which an action may otherwise be brought as provided in
27 this section, any judicial district in which any defendant is subject to the court's
personal jurisdiction with respect to such action.

28 28 U.S.C. § 1391(b).

1 District of California; it was *removed* from a state Superior Court. Consequently, § 1391 is
2 inapplicable. *See Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665-66 (1953). Venue of a
3 removed action is governed by 28 U.S.C. § 1441(a). *Id.* “Section 1441(a) expressly provides that
4 the proper venue of a removed action is ‘the district court of the United States for the district and
5 division embracing the place where such action is pending.’” *Id.* (quoting 28 U.S.C. § 1441(a)).
6 The Northern District of California is the district embracing Santa Cruz County, the place where the
7 action was pending prior to removal.

8 Accordingly, the motion to dismiss pursuant to Rule 12(b)(3) is DENIED.

9 **B. Change of Venue**

10 Moving Parties alternatively seek change of venue to the Eastern District of California
11 pursuant to 28 U.S.C. § 1404(a). The action could have been brought in the Eastern District of
12 California, where the Coleville Military Family Housing Complex is located, because “a substantial
13 part of the events or omissions giving rise to the claim occurred” there. *See* 28 U.S.C. § 1391(b)(2).
14 Defendants argue that the Eastern District of California is the more convenient forum for parties and
15 witnesses.

16 “In the typical case not involving a forum-selection clause, a district court considering a §
17 1404(a) motion (or a *forum non conveniens* motion) must evaluate both the convenience of the
18 parties and various public-interest considerations.” *Atl. Marine Constr. Co., Inc. v. United States*
19 *Dist. Court for the Western Dist. of Texas*, --- U.S. ----, 134 S. Ct. 568, 581 (2013). “Factors
20 relating to the parties’ private interests include ‘relative ease of access to sources of proof;
21 availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance
22 of willing, witnesses; possibility of view of premises, if view would be appropriate to the action;
23 and all other practical problems that make trial of a case easy, expeditious and inexpensive.’” *Id.* at
24 581 n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)). “Public-interest
25 factors may include ‘the administrative difficulties flowing from court congestion; the local interest
26 in having localized controversies decided at home; [and] the interest in having the trial of a diversity
27 case in a forum that is at home with the law.’” *Id.* (quoting *Piper Aircraft*, 454 U.S. at 241 n.6)
28 (alteration in original). The Supreme Court has indicated that “[t]he Court must also give some

1 weight to the plaintiffs’ choice of forum.” *Id.* The Ninth Circuit has gone further, holding that
2 “[t]he defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff’s
3 choice of forum.” *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.
4 1986).

5 Moving parties already have upset Plaintiffs’ choice of forum to some extent by removing
6 the action from the Santa Clara County Superior Court. That removal has not been contested.
7 Plaintiffs contend, however, that Moving Parties have not made a strong showing of inconvenience
8 sufficient to upset Plaintiffs’ choice to litigate in the Bay Area. The Court agrees. Moving Parties
9 assert in their motion brief that the Eastern District of California would be a more convenient forum
10 because the propane explosion occurred there and emergency responders who found Thor and
11 Celeste Westby reside there; however, those assertions are not supported by declarations or other
12 evidence. Plaintiffs, on the other hand, submit the declaration of Ara Jabaghourian, who states that
13 “[t]he Bureau of Alcohol, Tobacco, Firearms and Explosives has investigated the explosion,
14 interviewed witnesses, collected evidence from the scene, and written a report.” (Jabaghourian
15 Decl. ¶ 12, ECF 25-1) Jabaghourian also notes that a wrongful death case arising out of the
16 explosion currently is being litigated in Texas, and that the discovery cut-off in the Texas action is
17 August 5, 2014. (*Id.* ¶ 11) Given the availability of the investigative report and the discovery from
18 the Texas action, it is not clear that transferring the action to the Eastern District of California would
19 result in any significant benefit to the parties or counsel.

20 Plaintiff Thor Westby currently is stationed in Wahpeton, North Dakota, with the Military
21 Police Support Company, 4th Law Enforcement Battalion, and the Westby family currently resides
22 in Minnesota. (Jabaghourian Decl. ¶ 6) The six defendant companies are headquartered
23 throughout the country: Moving Parties Camp Pendleton & Quantico Housing, LLC and Lincoln
24 Property Company in Dallas, Texas; Jarsco Utilities, Inc. in Santa Cruz, California; Amerigas
25 Propane, L.P. in Pennsylvania; General Electric Company in New York; and ABC Fire Extinguisher
26 Company, Inc. in Nevada. (*Id.* ¶ 5) While one of the defendants is located in the Northern District
27 of California, none are located in the Eastern District of California. (*Id.*) Several of Defendants’
28 attorneys are located in the Northern District of California, while none are located in the Eastern


1 District of California. (*Id.* ¶¶ 8-10) The Bay Area is served by three major airports (*id.* ¶ 7), which
2 would make travel to the Northern District of California convenient for the parties, their counsel,
3 and witnesses (if necessary). Finally, Jabaghourian submits statistics that appear to show more
4 congestion in the Eastern District of California than in the Northern District of California. (*Id.* ¶¶
5 14-15 and Exhs. C, D)

6 Based upon this record, the alternative motion to change venue is DENIED.

7 **IV. ORDER**

8 For the foregoing reasons, the Motion to Dismiss or, in the Alternative, for Change of Venue
9 is DENIED.

10
11 Dated: June 18, 2014


BETH LABSON FREEMAN
United States District Judge